because obtained to the prejudice of such party's equitable right, may file a bill in equity for that purpose, no private citizen can maintain a suit to set aside such grant unless he can show that he has some right therein which is prejudiced by the grant.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 183.* 11 Va.-W. Va. Enc. Dig. 454.]

5. Nuisance (§ 72*)—Public Nuisance—Remedy of Private Person.—Where acts constitute a public nuisance, a private person who has only suffered with the general public cannot complain thereof.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.* 10 Va.-W. Va. Enc. Dig 538.]

Appeal from Circuit Court, Princess Anne County.

Action for an injunction by the Triple Island Gunning Club, Incorporated, against William B. Meredith and others. From a decree perpetually enjoining defendants, they appeal. Reversed.

D. H. & Walter Leake and *Scott, Buchannan & Cardwell,* for appellants.

Loyall, Taylor & White and *A. Johnston Ackiss,* for appellee.

SOUTHERN RY. CO. *v.* McMENAMIN et al.

Jan. 18, 1912. Rehearing Denied March 14, 1912.

[73 S. E. 980.]

1. Appeal and Error (§ 959*)—Review—Harmless Error—Pleading.—The allowance of an amendment before defendant had pleaded which did not change the cause of action could not have prejudiced defendant, where the trial was then postponed for two months.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.* 1 Va.-W. Va. Enc. Dig. 587.]

2. Railroads (§ 222*)—Operation—Nuisance—Action—Pleading.—In selecting a place for its yards and coal chutes and power house, a railroad is acting in its private capacity, such acts being mere incidents to the operation of the road, in which the public has no concern, and so, if the yards and coal chutes constitute a nuisance, it is unnecessary to allege or prove negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.* 10 Va.-W. Va. Enc. Dig. 522.]

3. Nuisance (§ 53*)—Actions—Damages—Evidence.—In an action for maintaining a smoke nuisance near plaintiff's residence, where the jury viewed the premises and the evidence fully showed the character of the injury complained of, the question of damages was properly

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

submitted to the jury, despite the absence of evidence of the pecuniary loss.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 53.* 10 Va.-W. Va. Enc. Dig. 521.]

4. Railroads (§ 222*)—Operation—Nuisance.—That the operation of trains casts some smoke upon the property of plaintiff will not warrant a railroad company in maintaining yards and coal chutes so near the property of plaintiff as to depreciate its value by reason of smoke.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.* 10 Va.-W. Va. Enc. Dig. 506.]

5. Appeal and Error (§ 1064*)—Review—Harmless Error—Instructions.—In an action against a railroad company for maintaining a smoke nuisance near plaintiff's residence, error in an instruction which eliminated from the consideration of the jury any question as to injury of plaintiff's personal property was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.* 1 Va.-W. Va. Enc. Dig. 600.]

6. Limitation of Actions (§ 55*)—Private Nuisance—Permanent Nuisance.—A railroad is a permanent structure, and, where it is a nuisance, there is only one right of action therefor, which will be barred within the statutory period, and the entire damage suffered both past and future must be recovered in one action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.* 14 Va.-W. Va. Enc. Dig. 661.]

7. Limitation of Actions (§ 55*)—Action for Nuisance—Railroad Company—Increase of Business.—Where a railroad company's yards were a nuisance when constructed, there was a single cause of action which accrued when the nuisance began, though the business of the road increased and the nuisance became greater from year to year.

[Ed. Note.—For other cases, see Limitation of Actions, Cent Dig. §§ 299-306; Dec. Dig. § 55.* 14 Va.-W. Va. Enc. Dig. 661.]

8. Limitation of Actions (§ 197*)—Accrual of Cause of Action—Nuisance—Evidence.—In an action against a railroad company for a nuisance arising from its establishment of its yards and coal chute near plaintiff's residence, where it appeared that the yards and chute had been there more than the statutory time, plaintiff's evidence that the damage was not appreciable until within recent times was not contradicted by proof that the railroad company had ceased to have some of its engines coaled at that yard, for the use of inferior coal or other causes might have operated to cause the increase of the injury.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.* 14 Va.-W. Va. Enc. Dig. 788.]

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Error to Circuit Court of City of Alexandria.

Action by Alice McMenamin and another against the Southern Railway Company. There was a judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Robert B. Tunstall and *Francis L. Smith,* for plaintiff in error.

J. K. M. Norton and *Edmund Burke,* for defendant in error.

WALTER *v.* WHITACRE et al.

Jan. 18, 1912. Rehearing Denied March 14, 1912.

[73 S. E. 984.]

1. Wills (§ 706*)—Action to Construe—Right to Appeal—Estoppel.—By suing to sell testamentary property and have the proceeds distributed according to a construction placed on the will by a decree, testator's widow waived her right to appeal from that decree, and a decree directing distribution of proceeds according to such construction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1683; Dec. Dig. § 706.* 1 Va.-W. Va. Enc. Dig. 474.]

2. Limitation of Actions (§ 146*)—"New Promise in Writing"—Sufficiency—Pleading.—That an inventory filed with a bill brought by testator's brother and others to construe the will listed a dobt as due the estate from the brother did not constitute a "new promise in writing," removing the bar of limitations, under Code 1904, § 2922, where the inventory was not signed by him or his agent, and the bill was not signed by him, but by counsel.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 593-596; Dec. Dig. § 146.* 9 Va.-W. Va. Enc. Dig. 432, 436.

For other definitions, see Words and Phrases, vol. 5, p. 4788.]

3. Limitation of Actions (§ 146*)—New Promise in Writing—Sufficiency—Depositions.—Where an inventory of testator's estate scheduled a debt due from a brother, the brother's deposition cannot be regarded as a new promise in writing, removing the bar of limitations, within Code 1904, § 2922, where it contained a denial that the debt stated in the inventory was a correct statement of his debt to testator.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig §§ 593-596; Dec. Dig. § 146.* 9 Va.-W. Va. Enc. Dig. 436.]

Appeal from Circuit Court, Frederick County.

Bill by W. C. Whitacre and others against Merrie Walter. From certain decrees, defendant appeals. Affirmed.

R. T. Barton, for appellant.

Ward & Larrick, M. M. Lynch, and *Sipe & Harris,* for appellees.

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.